UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HENRY WICKRAMASEKERA,
appellant,

v.

VETERANS ADMINISTRATION,
agency.

DOCKET NUMBER
CH07528210694

Date JUL 9

OPINION AND ORDER

The appellant was removed from his position of Police Officer with the agency's Westside Medical Center in Chicago, Illinois, on charges of sleeping on duty, failing to have his police radio and weapon secured, and failing to patrol his assigned area of responsibility. All three charges concerned incidents alleged to have occurred within an approximate 30-minute period on the morning of December 27, 1981.

On appeal to the Board's Chicago Regional Office, a designated presiding official analyzed the evidence and hearing testimony regarding these charges in a thorough initial decision, and determined that they were not proved by the agency by preponderant evidence. He also concluded that the removal was the result of agency discrimination against the appellant on the basis of his race (Indo-Aryan), and was in part based on conduct of the appellant which does not adversely affect his work performance or that of others, in contravention of 5 U.S.C. Section 2302(b)(10). In arriving at his findings and conclusions with regard to both the agency's charges and the appellant's affirmative defenses, the presiding official relied heavily on his impressions of the witnesses' demeanor while testifying at the hearing and his assessment of their relative credibility.

The agency has now petitioned for review of the initial decision, claiming that: (1) the evidence of record supports the removal action; (2) the appellant's affirmative defenses were not supportable; (3) the presiding official was so biased in his review of the case as to prejudice its outcome; and (4) the initial decision was based on erroneous interpretations of several sections of Title 5 of the United States Code and of the Code of Federal Regulations. The appellant responded in opposition to the petition for review.

The agency's arguments regarding the sufficiency of the evidence to establish the first charge--sleeping on duty--consist of an extensive narration of its version of the facts of the case, as well as quotations from the transcript of the hearing testimony. Pointing to what it feels are inconsistencies in the appellant's testimony, the agency complains that the presiding official apparently reached his conclusions "based solely on the appellant's credibility, and not on the facts of the case." However, we can perceive no error in the presiding official's decision-making methods in this regard.

In the absence of physical evidence of such an offense as sleeping on duty, the presiding official's need to rely exclusively on testimonial credibility to ascertain the facts is clear. The record regarding this charge is comprised of contradictions between the appellant's testimony and written statements and those of the agency witnesses. The presiding official devoted a substantial portion of his initial decision on this charge to his analysis of these contradictions. His choice between the disparate versions of the facts was necessarily the result of his assessment of the witnesses' demeanor, bearing and inherent believability, was clearly made with care, and is thus entitled to substantial deference upon review. See Weaver v. Department of the Navy, 2 MSPB 297 (1980).

While the agency's references to the record demonstrate that different interpretations and conclusions might have been drawn from the evidence and testimony, they are not sufficient to demonstrate a serious evidentiary question warranting a full review of the record and reassessment by the Board. See Weaver, supra, at 298. The fact that such disparity was not resolved in the agency's favor does not evince error on the presiding official's part.

The agency also claims that the presiding official erred in failing to consider, when assessing credibility, the past disciplinary records of the appellant and certain allegedly biased witnesses who testified in his favor. The list of the appellant's prior discipline set forth by the agency does not demonstrate a poor reputation for truthfulness on his part, nor does it establish a routine course of conduct which tends to show that he is culpable of the specific charges in this particular case. This is especially true in light of the presiding official's finding that the appellant had been the subject of disciplinary harassment in the past.

With regard to the agency's allegation of bias on the part of those witnesses whose testimony was favorable to the appellant, the agency has not shown that their having been previously disciplined in any way jeopardized the impartiality of their testimony, as alleged. Further, the fact that the appellant had solicited a report regarding the undependability of his radio equipment from a fellow employee is immaterial. It is the credibility and probative value of such a report, as determined in the presiding official's judgment, and not its voluntariness that is

important. 1/ See Anderson v. Veterans Administration, 3 MSPB 188 (1980).

In light of the foregoing, we find no reason to disturb the presiding official's finding that the appellant has successfully rebutted the agency's charge of sleeping on duty.

The agency next briefly reiterates its contention that it had sufficiently supported its charge that the appellant left his radio and weapon momentarily unsecured, on the date in question, in violation of internal agency rules. The sole issue with regard to this charge was what constitutes securing a weapon. The presiding official correctly noted that the regulation pertaining to this charge dealt only with the positioning of equipment being worn by the agency's employees, and he necessarily interpreted the regulation in light of testimony of past agency practice as to what was considered permissible security of such equipment when it is not being worn. The petition in this regard expresses the agency's belief that its definition of a secured weapon as one which is within the employee's immediate and direct control, is more sound and "remains supported by a preponderance of the evidence." Absent a showing of new evidence or of regulatory interpretative error, such a

---

1/ The agency also argues that the presiding official was so biased in his review as to prejudice the outcome of the case. This argument is not further developed in the petition for review. However, insofar as it may be intended to relate to this assertion regarding the presiding official's crediting of testimony of allegedly biased witnesses, we note that a presiding official's proper exercise of his statutory duty to weigh and consider the evidence in this case cannot, by itself, support a finding of prejudice. See Jefferson v. Veterans Administration, 6 MSPB 297, 298 (1981).

contention is insufficient to warrant further review under 5 C.F.R. Section 1201.115.

As to the third charge--failure to patrol assigned area of responsibility--the presiding official found the appellant to have rebutted the agency's prima facie case. His conclusion was based on his assessment of the appellant's testimonial demeanor and on the corroboration, by other witnesses, of key elements of the appellant's rebuttal. In its petition, the agency once again challenges the appellant's credibility on the basis of his prior disciplinary record and maintains that the events as related in its charge "were plausible" and "could exist." However, as noted above with regard to the first charge, we find no abuse of the presiding official's discretion in assessing credibility, and do not believe that his choice between conflicting versions of the facts based on that assessment was in error in this case.

We find, therefore, that the agency has failed to demonstrate a clear error of fact, interpretation or discretion on the part of the presiding official sufficient to warrant reversal of the presiding official's conclusion that the agency's charges were now supported by preponderant evidence.

The agency next challenges the presiding official's finding that discrimination on the basis of race and national origin, and reprisal for non-work related reasons, motivated the agency's action against the appellant. The agency argues that nowhere in the initial decision did the presiding official find that discrimination and reprisal were demonstrated as a motive by preponderant evidence. We note, however, that the presiding official correctly recited the applicable standard and burden of proof of such affirmative defenses in the initial decision and, after thorough analysis under that standard, concluded that they had been

established. The fact that the presiding official may not have restated the applicable burden in his concluding sentence cannot be considered reversible error.

The agency further argues that the inability of two of the appellant's witnesses to set forth particular instances of agency discrimination against the appellant is fatal to his affirmative defense. However, as noted by the appellant in his response to the petition, other witnesses identified specific acts of agency harassment based on the appellant's race and national origin and instances of inequitable treatment with no apparent legitimate basis. Further, contrary to the agency's claims, the totality of the testimony of the appellant's witnesses established a prima facie case of discrimination from which it could be inferred, if unexplained, that they were taken for prohibited, discriminatory reasons. See Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). After such a case was made, the agency was properly afforded the opportunity to set forth a legitimate, non-discriminatory reason for its action, pursuant to the guidelines set forth by the Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. Inasmuch as the charges against the appellant were properly found not to have been sustained, the agency's articulated, non-discriminatory reason for the removal may be deemed questionable. However, in order to find discrimination, the presiding official must determine not merely that the charges were unsustained on the merits, but also that they were not the true reason for the agency's employment decision. The appellant may demonstrate such pretext as follows:

> [E]ither directly by persuading the [Board] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

In this case, we find that the appellant has clearly established not only that the agency's charges against him lacked merit, but also that their proponents were not credible and their motivation was suspect. The appellant's evidence to support his claim of pretext properly included facts as to his supervisors' previous treatment of him and their general attitude toward his employment. See McDonnell-Douglas, supra, at 804. In this regard, the presiding official found evidence of negative feelings, remarks and actions against the appellant and incidents of inequitable treatment of him because of his race and/or national origin. He also found evidence of a prejudicial attitude toward the appellant in general on the part of his second-line supervisor, who had expressed an intention to "get rid of" him.

The agency further challenges the presiding official's statement that the security police force at the facility in question was "98% to 99% black," asserting that in fact three of the 24 employees were non-black. Assuming the accuracy of that assertion, we believe such a discrepancy to be de minimus, and find that the presiding official properly considered the racial mix of the work force in determining the agency's motivation in this case. Furnco Construction Co., supra, at 580.

The presiding official found that the totality of the appellant's evidence supported a finding of discrimination. Such a determination is within the domain of the trier of fact and, absent a demonstration of error, we will not further review the presiding official's findings in this regard. Person v. United States Department of Agriculture, 5 MSPB 85 (1981). See United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 1482-3 (1983); and Silberhorn v. General Iron Works Co., 584 F.2d 970, 971 (10th Cir. 1978).

The agency also challenges the presiding official's conclusion that the agency action was instigated by the

appellant's supervisor, in part, in reprisal for the appellant's refusal to cooperate with his persistent improper attempts to elicit personal information about an acquaintance of the appellant and thus constituted a prohibited personnel practice under 5 U.S.C. Section 2302(b)(10). However, the agency's argument--that this finding was "pretextual by the trier of facts"--is undeveloped, unsupported and insufficient to warrant review. Therefore, we will not disturb the presiding official's finding that the appellant's affirmative defenses of discrimination and reprisal were established by preponderant evidence.

Finally, the agency contends that the initial decision was based on the presiding official's erroneous interpretation of several provisions of the United States Code of Federal Regulations. These challenges are implicitly rejected in our discussions above, and we will address them only briefly here. Contrary to the agency's apparent contention, the presiding official properly applied 5 U.S.C. Sections 7513 and 7701(c)(1)(B), and 5 C.F.R. Section 1201.56(a)(1)(ii), in finding that the agency's action against the appellant was not taken for such cause as would promote the efficiency of the service, and that the underlying charges were not proved by preponderant evidence. The agency's allegation of erroneous interpretation of 5 U.S.C. Section 1205 is unexplained and unsupported. The agency's general assertion that the presiding official misinterpreted 5 C.F.R. part 752 is not specifically developed. However, insofar as it may be intended to refer to the presiding official's finding of prohibited personnel practices, our review has revealed no inconsistencies with 5 C.F.R. Section 752.403(b) or, for that matter, with 5 C.F.R. Section 1201.56(b)(2). Finally, since the initial decision contains the presiding official's findings and conclusions, and his reasons therefor, upon all material issues of fact and law presented in the record, the agency's allegation of misinterpretation of 5 C.F.R. Section 1201.111 (b)(1) is without merit.

Accordingly, the agency petition for review is hereby DENIED. 2/

Consistent with the initial decision, the agency is hereby ORDERED to cancel the removal 3/ and reinstate the appellant's employment effective the date of his removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Chicago Regional Office in accordance with 5 C.F.R. Section 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. Section 1201.113(b).

The appellant has the statutory right under 5 U.S.C. Section 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination.

The statute requires at 5 U.S.C. Section 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. Section 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to

---

2/ We note that the appellant's petition for attorney fees was prematurely filed with the Chicago Regional Office since the agency filed a timely petition for review of the initial decision, effectively staying its finality. See 5 C.F.R. § 1201.113(a). Under 5 C.F.R. § 1201.37(a)(2), a timely petition for fees may now be filed within ten (10) days of the date on which the initial decision becomes final under this Opinion and Order.

3/ Cancellation of the removal action includes the award of back pay and other benefits for the time period involved.

such prohibited discrimination claims. The statute requires at 5 U.S.C. Section 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. Section 2000e5(f) - (k), and 29 U.S.C. Section 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, cost, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or United States District Court, the appellant has the statutory right under 5 U.S.C. Section 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. Section 7703(b)(1) that a petition for such judicial review be filed with the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Paula A. Latshaw

PAULA A. LATSHAW
ACTING SECRETARY

Washington, D. C.